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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 J&J SPORTS PRODUCTIONS, INC., No. C-10-5126 CW (EMC)
9 Plaintiff,
10 v.
11 ROXANNE MONIQUE MOSLEY, *et. al.*,
12 Defendants.

**REPORT AND RECOMMENDATION
RE PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT**
(Docket No. 15)

**REPORT AND RECOMMENDATION
RE PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT**

15 Plaintiff J&J Sports Productions, Inc. (“J&J”) has filed suit against Defendant Roxanne
16 Monique Mosley, individually and doing business as the Sweet Fingers a/k/a Sweetfingers Jamaican
17 Restaurant. According to J&J, Ms. Mosley violated both federal and state law by intercepting and
18 exhibiting a particular television program to which J&J was granted exclusive distribution rights.
19 After Ms. Mosley failed to respond to the complaint in a timely fashion, his default was entered, *see*
20 Docket No. 13 (Notice of Entry of Default), and J&J moved for a default judgment. The assigned
21 judge referred J&J’s motion for default judgment to the undersigned for a report and
22 recommendation.

Having considered the papers submitted by J&J, and having held a hearing on the instant motion on March 30, 2011, at which Ms. Mosley did not appear, the Court hereby recommends that the motion for default judgment be **GRANTED**

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1 **I. FACTUAL & PROCEDURAL BACKGROUND**

2 J&J's complaint and evidence submitted in support of its motion for default judgment
3 establish the following.

4 J&J is a closed circuit distributor of sports and entertainment programming. *See Gagliardi*
5 Aff. ¶ 3. J&J was granted exclusive nationwide commercial distribution (closed circuit) rights to a
6 particular television program, namely, "*Firepower: Manny Pacquiao v. Miguel Cotto WBO*
7 *Welterweight Championship Fight.*" The program – which included undercard bouts – was to be
8 broadcast on November 14, 2009. *See Compl. ¶ 9; Gagliardi Aff. ¶¶ 3, 7.* J&J entered into
9 sublicensing agreements with various commercial entities pursuant to which it granted these entities
10 limited sublicensing rights – more specifically, the rights to publicly exhibit the program within their
11 respective commercial establishments. *See Compl. ¶ 10; Gagliardi Aff. ¶ 3.*

12 On November 14, 2009, one of J&J's investigators, Gary Gravelyn, entered a commercial
13 establishment known as Sweetfingers, which is owned by Ms. Mosley. *See Gravelyn Aff. at 1;*
14 *Compl. ¶¶ 7, 12.* Mr. Gravelyn paid no cover charge to enter the establishment. *See Gravelyn Aff.*
15 at 1. Mr. Gravelyn observed one television set in the establishment. *Id.* The television was
16 showing the program at issue – more specifically, the third round of the bout between Manny
17 Pacquio and Miguel Cotto. *See id.* J&J has submitted evidence indicating that it is highly unlikely
18 that the program at issue was innocently or accidentally intercepted. *See Gagliardi Aff. ¶ 9 et seq.*

19 Mr. Gravelyn did not see a cable box or a satellite dish in or at the establishment. *See*
20 *Gravelyn Aff. at 1.* In the eight minutes that Mr. Gravelyn was at the establishment, he counted
21 approximately seventeen people (two different head counts). *See id.* at 1-2.

22 Based on the above, J&J asserted the following causes of action in its complaint against Ms.
23 Mosley: (1) violation of 47 U.S.C. § 605; (2) violation of 47 U.S.C. § 553; (3) conversion; and (4)
24 violation of California Business & Professions Code § 17200. J&J does not include its fourth claim
25 in its motion for default judgment, however.

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II. DISCUSSION2 A. Service of Process

3 In deciding whether to grant or deny a default judgment, a court must first “assess the
4 adequacy of the service of process on the party against whom default is requested.” *Board of
5 Trustees of the N. Cal. Sheet Metal Workers v. Peters*, No. C-00-0395 VRW, 2000 U.S. Dist. LEXIS
6 19065, at *2 (N.D. Cal. Jan. 2, 2001). Under Federal Rule of Civil Procedure 4(e), Ms. Mosley may
7 be served pursuant to the law of California, where this Court is located. *See Fed. R. Civ. P.* 4(e)(1).
8 California law allows for substituted service on an individual where the summons and complaint
9 cannot, with reasonable diligence, be personally delivered. *See Cal. Code Civ. Proc.* § 415.20(b).

10 J&J has submitted a declaration from a process server indicating that Ms. Mosley could not,
11 with reasonable diligence, be personally served. *See Docket No. 11* (reflecting three attempts at
12 personal delivery prior to substituted service). The declaration also reflects that substituted service
13 in accordance with § 415.20 was effected. That is, the declaration reflects that a copy of the
14 summons and complaint was (1) left with an adult “person in charge” at Sweetfingers Restaurant
15 who was “informed of the contents thereof” on December 9, 2010 and (2) mailed “by first-class
16 mail, postage prepaid” to Ms. Mosley at Sweetfingers in San Leando, California on December 10,
17 2010. *See Cal. Code Civ. Proc.* § 415.20(b). Accordingly, the Court finds that service of process
18 was properly effected.

19 B. Eitel Analysis

20 As noted above, Ms. Mosley’s default was entered after he failed to respond to the
21 complaint. After entry of a default, a court may grant a default judgment on the merits of the case.
22 *See Fed. R. Civ. P.* 55. A default judgment may not be entered, however, against an infant or
23 incompetent person unless represented in the action by a general guardian or other such
24 representative who has appeared. *See id.* Furthermore, a default judgment may not be entered
25 against an individual in military service until after the court appoints an attorney to represent the
26 defendant. *See 50 U.S.C. App.* § 521. In the instant case, J&J has provided sufficient evidence
27 demonstrating that Ms. Mosley is not an infant, incompetent person, or a person in military service.

1 See Riley Decl. ¶ 3; Docket No. 11 (Proof of Service). Accordingly, the Court may consider
2 whether a default judgment may be entered against Ms. Mosley.

3 “The district court’s decision whether to enter a default judgment is a discretionary one.”

4 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Factors that a court may consider in
5 exercising that discretion include:

6 (1) the possibility of prejudice to the plaintiff, (2) the merits of
7 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4)
8 the sum of money at stake in the action; (5) the possibility of a dispute
9 concerning material facts; (6) whether the default was due to
10 excusable neglect, and (7) the strong policy underlying the Federal
11 Rules of Civil Procedure favoring decisions on the merits.

12 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Upon entry of default, the factual
13 allegations of the plaintiff’s complaint will be taken as true, except for those relating to the amount
14 of damages. See *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

15 The Court concludes that many of the *Eitel* factors weigh in favor of granting J&J default
16 judgment. For example, J&J would be prejudiced if default judgment were not granted because it
17 would be denied the right to judicial resolution of its claims and would likely be without other
18 recourse for recovery. See *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal.
19 2002) (“If Plaintiffs’ motion for default judgment is not granted, Plaintiffs will likely be without
20 other recourse for recovery.”). Also, the sum of money at stake in the action is, for the most part,
21 tailored to the specific misconduct of Ms. Mosley. See *id.* at 1176 (stating that “the court must
22 consider the amount of money at stake in relation to the seriousness of Defendant’s conduct”). In
23 addition, because Ms. Mosley has not filed an answer to the complaint, there is nothing to suggest
24 that there is a possibility of a dispute concerning material facts. Finally, there is no indication that
25 Ms. Mosley’s default was due to excusable neglect. The Court notes that not only were the
26 summons and complaint served on Ms. Mosley but also the motion for entry of default, see Docket
27 No. 13 (proof of service), and the currently pending motion for default judgment. See Docket No.
28 18 (proof of service). Furthermore, Ms. Mosley was given notice of the hearing on the motion for
 default judgment, see Docket No. 11 (certificate of service), but did not appear.

1 The only factors that deserve closer analysis are the second and third factors – *i.e.*, the merits
2 of J&J’s substantive claim and the sufficiency of the complaint. “The Ninth Circuit has suggested
3 that these two factors require that a plaintiff ‘state a claim on which the [plaintiff] may recover.’”
4 *Pepsico*, 238 F. Supp. 2d at 1175.

5 J&J has asserted various federal and state claims in its complaint and seeks damages
6 pursuant to § 605. The Court concludes that J&J has failed to adequately state a claim for relief
7 under § 605, but that is has stated a claim under § 553 and a claim for conversion.

8 47 U.S.C. § 605 “prohibits commercial establishments from intercepting and broadcasting to
9 its patrons *satellite* cable programming.” *J&J Sports Prods., Inc. v. Ro*, No. C 09-02860, 2010 U.S.
10 Dist. LEXIS 21425, at *7 (N.D. Cal. Feb. 19, 2010) (internal quotation marks omitted; emphasis
11 added). In contrast, 47 U.S.C. § 533 “prohibits a person from intercepting or receiving or assisting
12 in intercepting or receiving any communications service offered over a *cable system*.” *Id.* at *8
13 (internal quotation marks omitted; emphasis added). In other words, “[a] signal pirate violates
14 section 553 if he intercepts a *cable* signal, [but] he violates [section] 605 if he intercepts a *satellite*
15 broadcast.” *J&J Sports Prods., Inc. v. Manzano*, No. C-08-01872 RMW, 2008 U.S. Dist. LEXIS
16 84931, at *6 (N.D. Cal. Sept. 29, 2008) (emphasis added); *see also Charter Communs. Entm’t I v.*
17 *Burdulis*, 460 F.3d 168, 173 (1st Cir. 2006) (stating that “[s]ection 605 deals with communications
18 traveling through the air (via radio), whereas § 553 covers communications traveling over cable
19 wire”).

20 In the instant case, J&J alleges violations of both statutes. Since Mr. Gravelyn saw neither a
21 cable box nor a satellite dish, J&J cannot determine the precise means used to access the program.
22 *See* Gravelyn Aff. at 1. J&J argues that it “should not be prejudiced because it cannot isolate the
23 precise means of signal transmission [Ms. Mosley] used.” Pl.’s Mot. Mem. at 3. However, it is
24 highly improbable that J&J used both cable and satellite to display the event. As between the two, it
25 is less likely that satellite was used since the investigator looked for a satellite dish and did not see
26 one. *See* Gravelyn Aff. at 1. *See generally J&J Sports Prods., Inc. v. Ro*, No. C 09-02860, 2010
27 U.S. Dist. LEXIS 21425, at *9 (N.D. Cal. Feb. 19, 2010) (“The fact that [the] investigator did not
28 see a cable box and saw a satellite dish does not mean that there was not a device out of view to

1 receive cable transmissions.”). As one court observed, “a cable box is more easily hidden,” *J&J*
 2 *Sports Prods., Inc. v. Guzman*, No. C 08-05469 MHP, 2009 U.S. Dist. LEXIS 32273, at *6 (N.D.
 3 Cal. Apr. 16, 2009). Nor has J&J alleged, *e.g.*, that more business customers in the area received the
 4 program via satellite as opposed to cable. If J&J wanted to prove the means of signal transmission,
 5 “it could have filed a third party subpoena or requested an order for inspection. The fact that
 6 [Defendant] defaulted does not rule out [Plaintiff’s] opportunity to take third-party discovery.”¹ *Ro,*
 7 2010 U.S. Dist. LEXIS 21425, at *9. The Court therefore concludes that J&J has failed to establish
 8 a claim for relief under § 605 and recommends denial of the motion for default judgment on the §
 9 605 claim (Count I). The Court also finds, however, that J&J has adequately established a claim for
 10 relief under § 533 and recommends that default judgment be granted with respect to Count II.

11 The Court also recommends that the motion for default judgment be granted with respect to
 12 the conversion claim, as J&J has adequately stated a claim for relief. Under California law, the tort
 13 of conversion has three elements: (1) ownership or right to possession of property; (2) wrongful
 14 disposition of the property right of another; and (3) damages. *See G.S. Rasmussen & Assoc. v.*
 15 *Kalitta Flying Serv.*, 958 F.2d 896, 906 (9th Cir. 1992). In the instant case, J&J alleges that it
 16 obtained the distribution rights for the program at issue and that Ms. Mosley unlawfully intercepted
 17 the program and wrongfully converted it for his own use and benefit. *See Compl.* ¶¶ 9, 12, 24. J&J
 18 further alleges that Ms. Mosley deprived it of the license fee to which J&J would have been entitled
 19 had he obtained a license from J&J. *See Compl.* ¶ 25. Accordingly, the conversion claim is legally
 20 sufficient.

21 C. Damages

22 While allegations of the complaint must be taken as true in establishing liability, the Plaintiff
 23 must prove up damages. *See Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th
 24 Cir.1992); *see generally* Fed. R. Civ. P. 55(b)(2). J&J requests damages totaling \$112,200.

25 ¹ The Court also notes that it is not unfair to hold J&J to its burden of proof given that (1) the
 26 minimum statutory damages under § 605 exceed those under § 553 and (2) the maximum enhanced
 27 damages under § 605 exceed those under § 553. *Compare* 47 U.S.C. § 605(e)(C)(3) (providing for
 28 statutory damages of “not less than \$1,000 or more than \$10,000” and enhanced damages of “not
 more than \$100,000”), *with id.* § 553 (c)(3) (providing for statutory damages of “not less than \$250
 or more than \$10,000” and enhanced damages of “not more than \$50,000”).

1 First, J&J seeks \$2,200 in damages for the conversion claim. *See* Mot. at 15. California
2 Civil Code § 3336 provides:

3 The detriment caused by the wrongful conversion of personal property
4 is presumed to be:

5 First – The value of the property at the time of the conversion, with the
6 interest from that time, or, an amount sufficient to indemnify the party
7 injured for the loss which is the natural, reasonable and proximate
8 result of the wrongful act complained of and which a proper degree of
9 prudence on his part would not have averted; and

10 Second – A fair compensation for the time and money properly
11 expended in pursuit of the property.

12 Cal. Civ. Code § 3336. Here, J&J has submitted evidence that the sublicense fee for the program at
13 issue would have been at least \$2,200. *See* Gagliardi Aff. ¶ 8 & Ex. 1 (showing rates). Accordingly,
14 the Court recommends that J&J be awarded the \$2,200 in damages that it requests.

15 J&J also requests \$10,000 in damages—the statutory maximum – as well as \$100,000 in
16 enhanced damages – also the statutory maximum – under 47 U.S.C. § 605(e)(3)(C). The requested
17 amount of enhanced damages is not available under § 553, however. *See* 47 U.S.C. § 553(c)(3)
18 (providing for statutory damages of “not less than \$250 or more than \$10,000” and enhanced
19 damages of “not more than \$50,000”).

20 As to statutory damages under § 553, Plaintiff may recover between \$250 and \$10,000, “as
21 the court considers just” in statutory damages on its claim. 47 U.S.C. § 553(c)(3)(A)(ii). In its
22 analysis of appropriate statutory damages, the Court may consider the cost of a commercial license
23 for the program at issue (purportedly \$1,000), Defendant’s incremental profits, and the need to deter
24 piracy. *See Ho*, 2010 U.S. Dist. LEXIS 109575, at *3 (noting that “[a] traditional method of
25 determining statutory damages is to estimate either the loss incurred by the plaintiff or the profits
26 made by the defendants”) (citation and internal quotation marks omitted); *J&J Sports Prods., Inc. v.
27 Montecinos*, No. C-09-02604 JSW (EDL), 2009 U.S. Dist. LEXIS 122709, at *12-18 (N.D. Cal.
28 Dec. 17, 2009) (report and recommendation, subsequently adopted) (under § 605, concluding that
 maximum enhanced damages were not appropriate because the establishment did not promote itself
 by advertising the program, did not assess a cover charge, and did not charge a special premium for

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1 food and drinks); *see also J&J Sports Productions, Inc. v. Lopez*, 2008 WL 2915109, *4 (E.D. Cal.
2 2008).

3 Mr. Gravelyn stated that he paid no cover charge to enter the establishment during the
4 broadcast event. *See Gravelyn Aff.* at 1. He indicated that the restaurant advertised the event on a
5 “greaseboard” on a window, presumably at the restaurant entrance, and described its rates as “good.”
6 *See id.* He did not order or pay for any food or drinks, and did not otherwise indicate that the
7 establishment charge a premium on the price of drinks or food. There were some seventeen patrons
8 in the restaurant at the time, and the Program was playing on the sole television. *Id.* It was of
9 modest size (27”). *Id.* According to Mr. Gravelyn, the restaurant had the capacity to admit another
10 eighty patrons. *Id.* (“The capacity of this establishment is approximately 100 people.”).

11 In light of the absence of evidence of Plaintiff’s damages, and the absence of any indication
12 that Defendant is a repeat offender, the Court recommends an award of \$2,500, the loss incurred by
13 Plaintiff (which, given the modest number of patrons and the lack of a cover charge, probably
14 exceeded J&J’s profits) plus some margin for profits earned by J&J from the event. *See Ho, supra.*
15 *Cf. J & J Sports Productions, Inc. v. Flores*, 2009 WL 1860520, *2 (E.D. Cal. 2009); *Kingvision*
16 *Pay-Per-View, Ltd. v. Dosani*, 2006 WL 3316988 (S.D. Tex. 2006) (awarding \$1,000 in statutory
17 damages under 47 U.S.C. § 605 where the defendant played a pirated boxing match, there were
18 sixteen customers in the establishment, and there was no evidence that the defendant advertised the
19 match, that a premium was charged for food or drink, that an admission fee was charged, that the
20 patrons were in the establishment solely for the match, or that the defendant was a repeat offender).
21 *See also J&J Sports Productions, Inc. v. Montecinos*, 2010 WL 144817, *4 (N.D. Cal. Jan. 11, 2010)
22 (awarding \$5,000 in statutory damages, \$10,000 in enhanced damages, and \$3,750 for conversion
23 after noting that “[b]ecause Defendants are repeat offenders, Plaintiff is entitled to more than the
24 minimum statutory damages.”); *J&J Sports Productions, Inc. v. Dailey*, No. 09-cv-4205-JW (N.D.
25 Cal. March 19, 2010) (finding the defendant to be “a multiple offender for the purposes of a
26 damages award under § 605” and awarding \$2,500 in statutory damages, \$2,500 in enhanced
27 damages, and \$1,000 for conversion); *J&J Sports Productions, Inc. v. Esquivel*, 2008 WL 4657741
28 (E.D. Cal. 2008) (awarding \$10,000 under § 553 plus \$10,000 in enhanced damages after noting the

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1 “relatively small impact of Defendant’s actions” where the establishment had a maximum capacity
2 of 75 people, 35 people were present during the presentation of the pirated program, which was
3 playing on a single 27” screen); *J&J Sports Productions, Inc. v. Flores*, 2009 WL 1860520, *2 (E.D.
4 Cal. 2009) (awarding \$10,000 in statutory damages where there was no cover charge and 35 patrons
5 in the establishment during the presentation of the pirated program).

6 Although J&J cites authority in support of its position that the statutory maximums should be
7 awarded, that authority largely comes from outside this district. In this district, courts have typically
8 awarded less than the statutory maximums. *See, e.g., J&J Sports Prods., Inc. v. Ho*, No. 10-CV-
9 01883-LHK, 2010 U.S. Dist. LEXIS 109575 (N.D. Cal. Oct. 5, 2010) (under § 605, awarding \$1,600
10 in statutory damages and \$10,000 in enhanced damages); *J&J Sports Prods., Inc. v. Cardoze*, No. C
11 09-05683 WHA, 2010 U.S. Dist. LEXIS 74606 (N.D. Cal. July 9, 2010) (under § 553, awarding
12 \$1,000 in statutory damages and \$250 in enhanced damages); *J&J Sports Prods., Inc. v. Dailey*, No.
13 C 09-04205 JW, slip. op. (N.D. Cal. Mar. 19, 2010) (under § 605, awarding \$2,500 in statutory
14 damages and \$2,500 in enhanced damages); *J&J Sports Prods., Inc. v. Montecinos*, No. C-09-02604
15 JSW (EDL), 2009 U.S. Dist. LEXIS 122709, at *12-18 (N.D. Cal. Dec. 17, 2009) (report and
16 recommendation, subsequently adopted) (under § 605, concluding that maximum statutory damages
17 were not warranted because “there has been no evidence that Defendants received significant
18 financial benefits”; also concluding that maximum enhanced damages were not appropriate because
19 the establishment did not promote itself by advertising the program, did not assess a cover charge,
20 and did not charge a special premium for food and drinks). Notably, courts in this district have
21 declined to award the maximum enhanced damages even where the defendant is a “repeat offender.”
22 *See, e.g., Ho*, 2010 U.S. Dist. LEXIS 109575, at *4-5; *Dailey*, No. C09-04205 JW, slip. op. at 6.

23 The Court has discretion to enhance a damage award with additional damages up to \$50,000
24 where “the violation was committed willfully and for the purposes of direct or indirect commercial
25 advantage or private financial gain” 47 U.S.C. § 533(c)(3)(B). J&J contends that the evidence
26 before the Court justifies an inference that Defendant acted wilfully in unscrambling the signals
27 transmitting copyrighted material. The Court agrees that such an inference is justified here, in light
28 of the nature of the violation. *Cf. J & J Sports Productions, Inc. v. Garcia*, 2009 WL 2567891, *4

1 (S.D. Tex. 2009) (“The Defendant must have engaged in a deliberate act since ‘signals do not
2 descramble spontaneously, nor do television sets connect themselves to cable distribution
3 systems.’”) quoting *Time-Warner Cable of N.Y. v. Googies Luncheonette, Inc.*, 77 F. Supp. 2d 485,
4 490 (S.D.N.Y. 1999). The Court recommends that an award of enhanced damages of \$2,500 be
5 imposed. Together with the statutory damages, the award under § 553 totals \$5,000. Such an award
6 (particularly in light of the conversion damages and fees and costs discussed below) serves the
7 purpose of removing profits from the defendant and deterring future piracy.

8 D. Attorney’s Fees and Costs

9 Plaintiff requests an award of costs, including attorney’s fees, expended on this case. The
10 Court has discretion to grant such a request by a prevailing party pursuant to 47 U.S.C. §
11 553(c)(2)(C). Plaintiff’s counsel has provided a declaration substantiating the request for \$1,045 in
12 costs (\$600 for investigative expenses + a \$350 filing fee + \$95 for service of process) and
13 \$1,566.23 in attorney’s fees (2.225 attorney-hours at \$450/hr. plus hourly fees for paralegal (\$225)
14 and administrative \$339.98) services). The Court finds this request to be adequately documented
15 and reasonable under the circumstances. The Court therefore recommends granting Plaintiff’s
16 request for an award of attorney’s fees and costs totaling \$2,611.23.

17 **III. RECOMMENDATION**

18 For the foregoing reasons, the Court recommends that J&J’s motion for default judgment be
19 granted with respect to Counts II and III of the Complaint and denied with respect to Count I. The
20 Court recommends that J&J be awarded \$2,200 in damages for conversion, and \$5,000 in statutory
21 and enhanced damages under 47 U.S.C. § 553(c). The Court further recommends awarding
22 \$2,611.23 in attorney’s fees and costs pursuant to 42 U.S.C. § 553(c)(2)(C). Total damages
23 recommended amount to \$9,811.23.

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1 J&J is ordered to serve a copy of this report and recommendation on Ms. Mosley within
2 three days of the date of this order and file a proof of service with the Court.

3 Any party may file objections to this report and recommendation with the district judge
4 within fourteen days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P.
5 72(b); Civil L.R. 72-3.

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8 Dated: April 13, 2011


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10 EDWARD M. CHEN
11 United States Magistrate Judge